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(Revised)

# **McCain-Kennedy Would Allow Lawsuits Against Employers and Cancel Coverage for One Million Americans**

Through various iterations since 1997, Senate Democrats consistently have pushed “patients’ rights” legislation that would increase the number of uninsured Americans and expose employers to costly lawsuits. Most recently, 15 Senate Democrats – including Senators Ted Kennedy, Tom Harkin, and Hillary Clinton – offered yet another clone of past Democrat efforts, this time sponsored by Senator John McCain.

- The McCain-Kennedy bill (S. 283/H.R. 526) is a rehash of – and in some ways worse than – the Norwood-Dingell bill (H.R. 2990) rejected by the Senate in June.
- It would allow an unprecedented expansion of lawsuits, expose employers to liability, and overturn state laws.
- McCain-Kennedy could help increase health insurance costs as much as 31 percent over the next two years.

## **Liability & External Appeals**

McCain-Kennedy broadly authorizes federal and state personal injury lawsuits under the Employee Retirement Income Security Act (ERISA) for unlimited compensatory damages and punitive damages.

- **Employers would be sued under McCain-Kennedy.** A lawsuit need merely allege an employer directly participated in a medically reviewable decision to force the employer into court. Once in court, employers would be subject to a variety of possible interpretations of McCain-Kennedy’s complicated definition of “direct participation” in such a decision.
- **Claims that McCain-Kennedy caps punitive damages are misleading.** The bill caps punitive damages only for a new breed of federal lawsuits it would create. Such suits would be brought over disputes where no benefits were denied and would threaten

employers with uncapped compensatory damages (both economic and non-economic) *plus* punitive damages as high as \$5 million.

- **Claims that McCain-Kennedy only permits lawsuits “if all other means are exhausted” are wrong.** The bill would allow certain lawsuits without an external review and would even create incentives to go straight to trial rather than rely on more effective legal remedies already available.

### **Respecting States’ Regulatory Authority (Scope)**

While its sponsors claim McCain-Kennedy “allows states to develop their own patient protection laws,” the standard used is stricter than the Health Insurance Portability and Accountability Act (HIPAA)-like approaches the Senate has rejected in the past.

- **McCain-Kennedy would lead to a federal takeover of health insurance regulation.** McCain-Kennedy would require state laws to be both substantially equivalent to *and* as effective as federal law. This standard is so high, McCain-Kennedy likely would result in a takeover of private health care regulation by a Health Care Financing Administration (HCFA) that is not up to the task (see RPC paper, “GAO Report on 4-Year Old HIPAA Suggests HCFA Couldn’t Manage Kennedy-Dingell,” 5/19/00).

### **Cost/Impact on the Number of Uninsured**

Like other Democrat-backed bills, the cost of McCain-Kennedy would be devastating to families:

- **McCain-Kennedy could cancel coverage for one million Americans.** The nearest proxy for the cost of McCain-Kennedy is the Congressional Budget Office (CBO) estimate that the Norwood-Dingell bill (H.R. 2990 of the 106<sup>th</sup> Congress) would increase health premiums an average of 4.1 percent. The CBO has estimated that every 1-percent increase in health premiums due to mandates causes 300,000 Americans to lose their health coverage. Thus S. 283 could cancel coverage for as many as 1.2 million people.

The case against McCain-Kennedy was best made by Senator Joe Lieberman, when he spoke out against a similar Democrat bill rejected during the 106<sup>th</sup> Congress [*Congressional Record*, p. S8598, 7/15/99]:

“It opens up the system to the unlimited right to sue and creates the same prospect for the lotteries that have been going on elsewhere in the tort system. I am concerned that those ills will be repeated here – some will get rich and others, many others, will not be adequately compensated for the injuries they suffer as the result of the managed care plan decisions. **And some small businesses and individual people will be priced out of health insurance by the costs that will be added as a result of runaway judgements.**”